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8 *Attorney For Defendant Nicholas Silao*

9 UNITED STATES BANKRUPTCY COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 RIVERSIDE DIVISION

12 In re
13 PANDORA HOSPICE CARE, INC.
14 Debtor

15 KARL T. ANDERSON, CHAPTER 7
16 TRUSTEE

17 Plaintiff

18 vs.

19 NICHOLAS SILAO

20 Defendant

Case No. 6:17-bk-19336-SY

Adv. 6:18-ap-01193-SY

Before the Honorable Scott H. Yun

Chapter 7

**DEFENDANT'S MOTION TO ALLOW
WITHDRAWAL OF DEEMED
ADMISSIONS F.R.C.P. 36(B);
DECLARATIONS OF BARUCH C. COHEN,
NICHOLAS SILAO & SANAZ S.
BERELIANI**

Date: 1-23-2020

Time: 9:30 am

Place: 3420 Twelfth Street, Riverside, CA
Courtroom 302

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24 TO THE HONORABLE SCOTT H. YUN, UNITED STATES BANKRUPTCY COURT
25 JUDGE, PLAINTIFF KARL T. ANDERSON, CHAPTER 7 TRUSTEE, AND ALL INTERESTED
26 PARTIES:

27 **PLEASE TAKE NOTICE** that on 12-9-2019 at 10:00am in the Courtroom of the Honorable
28

1 Scott H. Yun, United States Bankruptcy Judge, Courtroom 302 located at the United States
2 Bankruptcy Court Central District of California 3420 Twelfth Street, Riverside, CA 92501-3819,
3 *Defendant* Nicholas Silao (hereinafter, "Defendant"), hereby moves to allow withdrawal of deemed
4 admissions.

5 The *Motion* will be based on this Notice, on the attached Memorandum of Points and
6 Authorities, the declarations of Baruch C. Cohen, Nicholas Silao & Sanaz Sarah Bereliani, on all the
7 papers and records on file in this action, and on such oral and documentary evidence as may be
8 presented at the hearing of the *Motion*.

9 Defendant bring this *Motion* pursuant to F.R.C.P. § 36(b) that withdrawal or amendment of
10 the Admissions that were deemed admitted : 1) would serve the presentation of the case on its merits,
11 and 2) would not prejudice the party that obtained the admissions in its presentation of the case.

12 Defendant further request \$6,600.00 in sanctions be awarded his attorneys fees, due to
13 Plaintiff's wrongful refusal to stipulate to the relief, withholding whether Plaintiff met & conferred
14 and served the Defendant, with Plaintiff's F.R.C.P. 26 Initial Disclosures (F.R.C.P. 26(d)(1) prohibits
15 discovery before the parties have met & conferred as required by F.R.C.P. 26(f).

16 Pursuant to Local Bankruptcy Rule 9013-1, any objection or response to this *Motion* must be
17 stated in writing, filed with the Clerk of the Court and served on Defendant and his counsel no later
18 than fourteen days prior to the hearing. Failure to so state, file and serve any opposition may result
19 in the Court failing to consider the same.

20
21 DATED: January 22, 2020

LAW OFFICE OF BARUCH C. COHEN, APLC

22 By /S/ Baruch C. Cohen
23 Baruch C. Cohen, Esq.
24 *Attorney For Defendant Nicholas Silao*
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1 **1. MEMORANDUM OF POINTS & AUTHORITIES**

2 a. **FACTS**

3 On 11-8-2017, the Debtor Pandora Hospice Care, Inc., commenced this bankruptcy
4 proceeding Case No. 6:17-bk-19336-SY.

5 On 10-2-2018, Plaintiff filed this adversary action entitled: *Karl T. Anderson against Nicholas*
6 *Silao*, Adversary case 6:18-ap-01193 [Doc-1]

7 On 10-31-2018, Defendant, represented by Sanaz S. Bereliani filed an Answer to the
8 Complaint [Doc-4].

9 On 1-2-2019, the parties filed a Joint Status Report [Doc-5]. Of particular interest, in Section
10 A4 of the Joint Status Report the parties acknowledged that they did **not** meet & confer pursuant to
11 LBR 7026-1.¹

12 Pursuant to the Status Conference and Scheduling Order Pursuant to LBR 7016-1(a)(4) [Doc-
13 10], the discovery cutoff was 6-28-2019, the pre-trial stipulation was due 8-1-2019, the pretrial
14 hearing was 8-15-2019, and the mediation completion date was 7-31-2019.

15 On 3-15-2019, Defendant's counsel Bereliani moved to withdraw as counsel of record [Doc-
16 12], and on 4-16-2019, the Court entered its Order Granting Motion To Withdraw As Counsel Of
17 Record [Doc-16].

18 On 8-7-2019 at 10:42am, Defendant wrote Berliani (copying Cohen) and demanded his file
19 from her pursuant to the California Rule of Professional Responsibility 4-100(B)4, that provides that
20 an attorney must promptly pay or deliver, as requested by the client, any funds, securities, or other
21 properties in the possession of the member which the client is entitled to receive.²

22 On 8-7-2019, at 2:18pm, Berliani wrote back: " Not much - Nick went MIA on us shortly after
23 the beginning and we just bought him time with the Tee's attorney... " and sent the following 12

24 _____
25 ¹A true and correct copy of the 1-2-2019 Joint Status Report [Doc-5] is attached hereto as
26 Exhibit "1" and is incorporated herein by this reference.

27 ²A true and correct copy of Defendant's 8-7-2019 letter to Berliani (copying Cohen)
28 demanding his file from her pursuant to the California Rule of Professional Responsibility 4-100(B)4
is attached hereto as Exhibit "2" and is incorporated herein by this reference.

documents: (1) The Complaint; (2) Your Retainer Agreement; (3) A Waiver of Conflict of Interest for a Joint Representation signed by Nick Silao; (4) A Waiver of Conflict of Interest for a Joint Representation signed by Ray Silao; (5) A Paypal receipt of Nick's payment to you; (6) the Answer to the Complaint; (7) Another copy of the Answer to the Complaint; (8) the filed JSR; (9) the filed Scheduling Order; (10) a blank form Substitution of Attorney; (11) the Order Granting your Motion to Withdraw; & (12) the LOU receipt of her Order Granting her Motion to Withdraw.³

On 8-8-2019, at 6:53am, Cohen wrote Berliani: "Thx for the prompt reply. Did Plaintiff send you Plaintiff's FRCP 26 Initial Disclosures? If so, please send it. Was any discovery done in this adversary? If so, please send them."⁴

On 8-8-20189 at 8:216am, Berliani responded: "Per my previous email, there was no communication by your client so no nothing further was done. They retained me on a limited scope and were not in touch after with further instruction or guidance. I recommend calling Trustees counsel regarding case status, I'm surprised they haven't filed anything else yet. Nick got lucky."⁵

On 8-9-2019, Defendant retained litigation counsel Baruch Cohen to defend him in this action, who then filed the *Substitution of Attorney* [Doc-25] on 8-12-2019

Before being retained, Cohen specifically inquired of Defendant and Ms. Bereliani whether they received any discovery from Plaintiff in this adversary, whether they received a proposed Joint Pre-Trial from Plaintiff, & whether they received any FRCP 26 Initial Disclosures from Plaintiff. While Ms. Bereliani withdrew from the case in 4-16-2019, Cohen still inquired of her too, just in case. Both Ms. Bereliani & Defendant informed Cohen that they did not receive any of the aforementioned from Plaintiff. On that basis, Cohen took the case.

Cohen was prepared to file a declaration pursuant to LBR 7016-1(E)(2), when he checked

³A true and correct copy of Berliani's 8-7-2019 letter to Defendant (copying Cohen) is attached hereto as Exhibit "3" and is incorporated herein by this reference.

⁴A true and correct copy of Cohen's 8-8-2019 letter to Berliani is attached hereto as Exhibit "4" and is incorporated herein by this reference.

⁵A true and correct copy of Berliani's 8-8-2019 letter to Cohen is attached hereto as Exhibit "5" and is incorporated herein by this reference.

1 PACER and discovered Plaintiff's Unilateral Pre Trial and Declaration filings of 8-8-2019, and was
2 surprised, to see that Plaintiff claimed that he indeed propounded discovery to Defendant - Request
3 for Admissions ("RFA's") and that Defendant did not respond, and Plaintiff is deeming the following
4 admissions, admitted:

5 RFA # 4. The Debtor loaned/transferred \$137,000 to Defendant, Nicholas Silao. The Debtor's
6 2016 Federal Income Tax Returns signed under penalty of perjury reflected the outstanding loan owed
7 by Defendant, Nicholas Silao to the Corporate Debtor. (Unresponded to Request for Admission No.
8 1).

9 RFA # 5. Pursuant to the Debtor's 2016 Federal Income Tax Returns, Defendant, Nicholas
10 Silao owes the Plaintiff/Chapter 7 Trustee no less than \$137,000, plus any and all costs of collection.
11 (Unresponded to Request for Admission No. 4).

12 RFA # 6. Plaintiff/Chapter 7 Trustee is entitled to pre-judgment interest as provided under
13 applicable non-bankruptcy law (Unresponded to Request for Admission No. 5).

14 RFA # 7. Defendant, Nicholas Silao has no defenses and/or counterclaims to Plaintiff/Chapter
15 7 Trustee's demand for \$137,000. (Unresponded to Request for Admission No. 6).

16 RFA # 8. Defendant, Nicholas Silao has no facts that dispute Plaintiff/Chapter 7 Trustee's
17 entitlement to \$137,000 demanded in the Trustee's Complaint. (Unresponded to Request for
18 Admission No. 7).

19 RFA # 9. Defendant, Nicholas Silao has no documents, notes or other writings that disputes
20 the Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint. (Unresponded to Request
21 for Admission No. 8).

22 RFA # 10. Defendant, Nicholas Silao has no witnesses that dispute the Trustee's entitlement
23 to \$137,000 demanded in the Trustee's Complaint. (Unresponded to Request for Admission No. 9).⁶

24 On 8-9-2019 at 6:34am, Cohen wrote Berliani informing her that Plaintiff's Unilateral Pretrial
25 stated that he indeed propounded discovery Request for Admissions ("RFA's") to the Defendant, that
26

27 ⁶A true and correct copy of Plaintiff's 8-8-2019 Unilateral Pretrial & Declaration is attached
28 hereto as Exhibit "6" and is incorporated herein by this reference.

1 Defendant did not respond to, and that they are now deemed admitted. Cohen asked Berliani why
2 wasn't Cohen given copies of this discovery?"⁷

3 On 8-9-2019 at 12:17pm, Berliani responded: "Ps I'll speak to my office regarding receipts
4 of anything on their end but please note we were retained specifically for an answer and joint status
5 report and conference. We had no further involvement or guidance. Lastly, I appreciate your
6 professionalism going forward."

7 On Friday 8-9-2019 at 11:22am, Cohen wrote Plaintiff's counsel to meet & confer regarding
8 Plaintiff's *Unilateral Pre Trial* [Doc-23] and *Declaration* [Doc-24] in advance of the upcoming Pre
9 Trial hearing of 8-22-2019.⁸

10 Specifically, Cohen asked Plaintiff's counsel: (1) to see Plaintiff's F.R.C.P. 26 Initial
11 Disclosures; (2) to See Plaintiff's Discovery; (3) to show Plaintiff that Defendant has evidence to
12 dispute Plaintiff's turnover claim for \$137,000.00; & (4) to seek clarification regarding Plaintiff's
13 efforts to meet & confer with Defendant regarding the Joint Pre-Trial Report.

14 On Sunday 8-11-2019, Plaintiff's counsel emailed Cohen stating: "*Thanks for your email.*
15 *Please know I will not litigate this matter via email, thus if you believe your client is entitled to relief*
16 *from the Court, please file a properly noticed motion pursuant to the Local Bankruptcy Rules.*
17 *Consequently, at this point we are proceeding in the ordinary course pursuant to the Court's*
18 *presently set scheduling order. Finally, if you intend to proceed with any type of judicial relief, please*
19 *note I'll be traveling to and from Shanghai China for my son's college freshman activities between*
20 *the afternoon of August 22 and returning to the OC on or about August 29, 2019, thus we will object*
21 *to any relief that requires my office to take action during that time period. Thank you.*"⁹

22 This was a strange response to my meet & confer letter of 8-9-2019 for the following reasons:
23 _____

24 ⁷A true and correct copy of Cohen's 8-9-2019 letter to Berliani is attached hereto as Exhibit
"7" and is incorporated herein by this reference.

25 ⁸A true and correct copy of Cohen's 8-9-2019 meet & confer letter to Plaintiff's counsel is
26 attached hereto as Exhibit "8" and is incorporated herein by this reference.

27 ⁹A true and correct copy of Plaintiff's counsel's email of 8-11-2019 is attached hereto as
28 Exhibit "9" and is incorporated herein by this reference.

1 1. Regarding Cohen's simple request to see Plaintiff's F.R.C.P. 26 Initial Disclosures, Cohen
2 asked counsel whether he met & conferred and served the Defendant, with Plaintiff's F.R.C.P. 26
3 Initial Disclosures, and if he did, to please send Cohen a copy, because as the Court knows, F.R.C.P.
4 26(d)(1) prohibits discovery *before* the parties have met & conferred as required by F.R.C.P. 26(f).
5 Further, as the Court knows, F.R.C.P. § 26(a)(1)© requires a plaintiff to make the initial disclosures
6 at or within 14 days after the parties' Rule 26(f) conference. In Plaintiff's 1-2-2019 Status Conference
7 Report [Doc-5], Section A4 of the Joint Status Report the parties acknowledged that they did **not**
8 meet & confer pursuant to LBR 7026-1, and Plaintiff pledged to meet and confer by 1-17-2019.
9 Plaintiff's Initial Disclosures were due by 1-31-2019. So Cohen inquired whether Plaintiff met &
10 conferred before or after the 1-17-2019 date. So Cohen merely asked to see Plaintiff's compliance
11 with his F.R.C.P. 26 Disclosures requirement. To Cohen's surprise, rather than simply send them to
12 Cohen, Plaintiff stonewalled me with his non-response of 8-11-2019. So Cohen had no copy of
13 Plaintiff's F.R.C.P. 26 Initial Disclosures to work from.

14 2. Regarding Cohen's simple request to see Plaintiff's discovery, Cohen informed Plaintiff
15 that Defendant informed Cohen that he does not recall receiving any discovery from Plaintiff, let
16 alone RFA's, and inquired whether Plaintiff's discovery was propounded before or after the 6-28-2019
17 Discovery Cutoff date? And if so, to please provide Cohen with copies of the propounded discovery
18 so that Cohen can respond to them. Cohen also asked that Plaintiff stipulate to withdraw the deemed
19 status and allow Defendant to respond to them. To Cohen's surprise, rather than simply send them
20 to Cohen, Plaintiff stonewalled Cohen with his non-response of 8-11-2019. So Cohen did not have
21 a copy of Plaintiff's discovery to work from.

22 3. Regarding Cohen's simple request for clarification regarding Plaintiff's efforts to meet &
23 confer with Defendant regarding the Joint Pre-Trial Report, Cohen reported to counsel that his
24 Declaration in support of the Unilateral Pre Trial states that "On or about July 22, 2019, I called the
25 telephone number listed on the adversary proceeding docket's cover page and left a message, but no
26 return call; or email was received by Defendant Nicholas Silao," and that Defendant informed Cohen
27 that he does not recall receiving any such telephone call from Plaintiff. Cohen expressed to counsel
28

1 concern with Plaintiff's claim of a 7-22-2019 telephone call, because as the Court is aware, LBR
2 7016-1(b)(1)© requires that the parties must meet and confer at least 28 days before the date set for
3 pretrial conference, the pretrial hearing was 8-22-2019, and the 28-day meet & confer deadline was
4 7-5-2019, meaning that Plaintiff's attempted meet & confer of 7-22-2019 was not timely.

5 Cohen expressed to Plaintiff his additional concern with why his declaration fails to state that
6 he emailed the proposed Joint Pre Trial to Defendant that is listed in the *Order Granting Bereliani's*
7 *Motion to Withdraw as Counsel of Record* [Doc-16] and in the PACER docket nsilao@aol.com?

8 Cohen expressed to Plaintiff his additional concern with Plaintiff's Declaration in support of
9 the Unilateral Pre Trial that states: "On or about July 29, 2019, my office sent Defendant Nicholas
10 Silao at the address listed on the adversary proceeding docket via Federal Express delivery the Joint
11 PreTrial Stipulation." Cohen informed counsel that Defendant claims and insists that he does not
12 recall receiving any such Joint Pre Trial Stipulation, and Cohen requested that Plaintiff provide Cohen
13 with his 7-29-2019 letter, the FEDEX slip, and the proposed JPS of 7-29-2019. To Cohen's surprise,
14 rather than simply send them to Cohen, Plaintiff stonewalled him with his non-response of 8-11-2019.
15 So Cohen has no no copy of Plaintiff's Joint Pretrial that he allegedly sent to work from.

16 Regarding the last point of Cohen's letter to demonstrate that Defendant has evidence to
17 dispute Plaintiff's turnover claim for \$137,000.00, that he has witnesses and exhibits re same, Cohen
18 produced these documents to counsel sight unseen, without the Plaintiff having to formally demand
19 them from Defendants to substantiate Defendant's claim that he has exhibits to support his defense:

20 RFA # 4. The Debtor did not lend \$137,000 to Defendant. The facts will reveal just the
21 opposite: My client lent Pandora \$442, 00.00.

22 RFA # 5. Defendant does not owe the Plaintiff \$137,000 (plus any and all costs of collection).

23 RFA # 6. Plaintiff is not entitled to pre-judgment interest as provided under applicable
24 non-bankruptcy law.

25 RFA # 7. Defendant, Nicholas Silao has defenses to Plaintiff's demand for \$137,000, as raised
26 in Defendant's *Answer* [Doc-4]. Again, the Debtor did not lend \$137,000 to Defendant. The facts will
27 reveal just the opposite: My client lent Pandora \$442, 00.00.

1 RFA # 8. Defendant **has** facts that dispute Plaintiff's entitlement to \$137,000 demanded in the
2 Trustee's Complaint.

3 RFA # 9. Defendant **has** documents, notes or other writings that dispute the Plaintiff's
4 entitlement to \$137,000 demanded in the Trustee's Complaint.

5 Regarding the exhibits, Cohen presented to Plaintiff:

6 Pandora's loan report to the Silao brothers reflecting that during the period of 12-16-2013 -
7 5-20-2015, Defendant lent Pandora approximately \$442,000.00 (and that his brothers Michael Silao
8 lent Pandora \$70,000.00, Sam Silao lent Pandora \$6,000.00, & Ray Silao lent Pandora \$143,911.37,
9 totaling \$662,411.37).

10 The last page of Pandora's **2014** tax return (**FYE 12-31-2014**) Form 1120, Page 5, Schedule
11 L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed \$389,750.00 by
12 Pandora for that year ("Loan Payable N Silao");

13 The last page of Pandora's **2015** tax return (**FYE 12-31-2015**) Form 1120, Page 5, Schedule
14 L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed between
15 \$389,750.00 - \$297,250.00 by Pandora for that year ("Loan Payable N Silao");

16 Pandora's Balance Sheet as of **12-31-2015**, under the section entitled: "Liabilities & Equity"
17 reflecting "Loan/Financing Payable N. Silao \$297,250.00;

18 The last page of Pandora's **2016** tax return (**FYE 12-31-2016**) Form 1120, Page 5, Schedule
19 L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed between
20 \$297,250.00 - \$295,250.00 by Pandora for that year ("Loan Payable N Silao");

21 Pandora's (9) checks to my client that contain the notation: "Reimbursement - Loan:"

- 22 i. Pandora's 7-31-2015 check # 9001 to Defendant for \$25,000.00;
- 23 ii. Pandora's 9-4-2015 check # 9002 to Defendant for \$25,000.00 contains the
24 notation: "Loan Repayment;"
- 25 iii. Pandora's 9-15-2015 check # 1112 to Defendant for \$2,500.00 contains the
26 notation: "Reimbursement - Loan;"
- 27 iv. Pandora's 10-9-2015 check # 9003 to Defendant for \$25,000.00 contains the
28

notation: "Loan Repayment;"

v. Pandora's 10-15-2015 check # 1130 to Defendant for \$2,500.00 contains the

notation: "Reimbursement;"

vi. Pandora's 11-1-2015 check # 1131 to Defendant for \$2,500.00 contains the

notation: "Reimbursement;"

vii. Pandora's 11-2-2015 check # 0005 to Defendant for \$25,000.00 contains the

notation: "Loan Repayment;"

viii. Pandora's 12-1-2015 check # 1132 to Defendant for \$2,500.00 contains the

notation: "Reimbursement;"

ix. Pandora's 12-2-2015 check # 8655 to Defendant for \$25,000.00 contains the

notation: "Loan Repayment."

Regarding the witnesses, I disclosed to counsel:

RFA # 10. Defendant has witnesses that dispute the Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint: Defendant; the other Silao brothers; Pandora's CPA Rufino Reyes Magpayo.

Cohen's letter recommended that the parties push "reset" on this case: (1) so that Plaintiff can provide Cohen with all of the above-requested documents; (2) to stipulate to withdraw the deemed admissions; (3) to allow Defendant to respond to Plaintiff's discovery; (4) to allow Defendant to participate meaningfully to the Joint Pre Trial report; & (5) to stipulate to continue the pre-trial to a mutually agreeable date. Cohen concluded that he believes that the Court would prefer to try the case on the merits rather than granting the Plaintiff defaults against an *in pro per* defendant based on the above. Cohen was even so bold as to suggest that since Plaintiff's case appears to be solely predicated on a 2016 tax return, that upon Plaintiff verifying the Defendant's evidence, that the Plaintiff consider dismissing this adversary complaint. Cohen truly believed he was being completely reasonable and practical, given the situation that he found himself in. Cohen's requests to see Plaintiff's Initial Disclosures, Discovery, and proof of his meet & confer compliance, are completely legitimate, not being made for any improper⁴ purpose. One would think, that a Plaintiff would agree to produce the

1 aforementioned and stipulate to continue the pretrial - especially in light of his late compliance with
2 LBR 7016-1(b)(1)© - to allow the defendant to participate meaningfully in his defense. Instead, and
3 to Cohen's surprise, rather than simply send them to Cohen, Plaintiff stonewalled him with his non-
4 response of 8-11-2019.

5 On 9-4-2019, Cohen wrote Plaintiff again. " am writing you to meet & confer regarding: (1)
6 the proposed Joint Pre Trial Stipulation; (2) the proposed Motion in Limine, & (3) the proposed
7 Motion to Withdraw the Deemed Admissions pursuant to F.R.C.P. § 36(b). As I wrote you on
8 8-9-2019, I'm running blind here, because I do not have: (1) Plaintiff's F.R.C.P. 26 Initial
9 Disclosures; & (2) Plaintiff's written discovery including Plaintiff's Request for Admissions
10 ("RFA's"). Both Ms. Bereliani and my client informed me that they do not have copies of them.
11 Accordingly, please provide them to me. If I do not receive them from you, I will have no choice but
12 to file the proposed motions. As I indicated in Defendant's 8-12-2019 Unilateral Pre-Trial Report
13 [Doc-28], Defendant intends to file a Motion in Limine to exclude Plaintiff's evidence at trial, based
14 on Plaintiff's failures to comply with FRCP 26. Your cooperation in providing me with the requested
15 documents will impact greatly on whether I will file the Motion in Limine or not. I also indicated that
16 Defendant intends to file a Motion to Withdraw the Deemed Admissions pursuant to F.R.C.P. § 36(b),
17 based on my client's representation that he never received Plaintiff's (alleged) Request for
18 Admissions. Please advise if Plaintiff will stipulate to withdraw the deemed admissions and I will
19 gladly prepare the stipulation and order. To expedite the process, enclosed please find Defendant's
20 Verified Response to Request for Admissions that is based on Plaintiff's Unilateral PreTrial Report
21 that identified the six (6) Requests for Admission.¹⁰

22 On 9-11-2019, Plaintiff responded: "Baruch, I never received a response from you last week
23 regarding the Meet and Confer issues noted in your 9/4/11 faxed letter. I had proposed a "Meet and
24

25 ¹⁰A true and correct copy of Cohen's 9-4-2019 Meet & Confer letter Re: Proposed Joint Pre
26 Trial Stipulation; Proposed Motion in Limine, & Proposed Motion to Withdraw the Deemed
27 Admissions pursuant to F.R.C.P. § 36(b) and Defendant's Verified Response to Request for
28 Admissions that is based on Plaintiff's Unilateral PreTrial Report that identified the six (6) Requests
for Admission is attached hereto as Exhibit "10" and is incorporated herein by this reference.

1 Confer" telephone call for Friday September 6, 2019 but never heard back from you. Secondly, I don't
2 understand the legal effect if any of the verified responses included with your 9/4/19 fax. Rather, I've
3 enclosed the RFAs that were properly served on your client's former counsel at her address of record
4 in the above-captioned Adversary proceeding. Thus pursuant to F.R.C.P. 36 (made applicable to this
5 Adversary Proceeding per Rule 7036 of the Fed Rules of Bankr Procedure) the unresponded to RFAs
6 are still, enforceable and we intend to use them until there's a court order to the contrary. Any
7 questions or comments, please let me know. thanks." Plaintiff attached a copy of an RFA.¹¹

8 On 9-11-2019, Cohen responded: "Tom: I do not recall you proposing, and me accepting, a
9 proposed meet & confer with me on 9-6-2019. But I'm happy to do so immediately. I also want to
10 state emphatically, that Berliani did not share your RFA with me, and that Nick Silao swears over a
11 stack of bibles that he never received them. Finally, I need to see your Initial Disclosures. As I'm sure
12 you know, F.R.C.P. 26(d)(1) prohibits discovery before the parties have met & conferred as required
13 by F.R.C.P. 26(f). If you did not do a F.R.C.P. 26 Initial Disclosure, the RFA's would be improper.
14 If you did do a F.R.C.P. 26 Initial Disclosure, please provide it to me. I've now asked you for this
15 twice."¹²

16 On 9-11-2019 Cohen wrote Berliani informing her that Plaintiff sent Cohen an RFA that
17 purports to have been served on her office on 3-7-2019 at your address "Sanaz S. Bereliani, Bereliani
18 Law Firm, 11400 W. Olympic Blvd., Suite 200, Los Angeles, CA 90064. On 3-15-2019, she moved
19 to withdraw as counsel to Defendant. So she must have had the 3-7-2019 RFA's in her file before she
20 moved to withdraw on 3-15-2019. Yet, she did not produce it to Defendant or to Cohen in violation
21 of Rule 4-100(b)(4). Cohen was very concerned that she had this RFA in her file and did not produce
22 it when Defendant demanded it. So Cohen asked her again: "Did Plaintiff send you Plaintiff's FRCP

23
24 ¹¹A true and correct copy of Plaintiff's counsel's email of 9-11-2019 is attached hereto as
25 Exhibit "11" and is incorporated herein by this reference. While Defendant's counsel would not
26 accuse Plaintiff's counsel of forging the Request for Admission, one can easily be generated, and
backdated, without any independent way of verifying that it is authentic. Of particular note is that
Plaintiff presented no proof that the RFA was actually mailed to Berliani.

27 ¹²A true and correct copy of Cohen's 9-11-2019 letter to Plaintiff is attached hereto as Exhibit
28 "12" and is incorporated herein by this reference.

26 Initial Disclosures? If so, please send it. Was any discovery done in this adversary? If so, please send them.” Cohen was very concerned that now the RFA's are deemed admitted, and Defendant will now have to spend money to file a Motion to have the Deemed Admissions Withdrawn, which he should not have to do, had she forwarded to him the RFA's when you received it on 3-7-2019.¹³

On 9-12-2019, Cohen spoke with Berliani, who represented that the only documents she had in her file were those that she forwarded to Cohen earlier. When pressed again whether she had the RFA in her file and whether she had Plaintiff's FRCP 26 Initial Disclosures, she repeated again, that the only documents she had in her file were those that she forwarded to Cohen earlier.

On 9-17-2019, Cohen wrote Plaintiff's counsel to meet & confer and sent him a *Proposed Joint Stipulation in Connection with Defendant's Motion to Allow Withdrawal of Deemed Admissions F.R.C.P. § 36(B)* (“Proposed Joint Stipulation”).¹⁴

On 9-17-2019, Plaintiff's counsel wrote back declining to participate in the Proposed Joint Stipulation.¹⁵

Bottom line, Plaintiff has still not produced to Cohen Plaintiff's FRCP 26 Initial Disclosures that would have entitled him to conduct discovery, despite being asked for this document at least two times.

b. LEGAL ARGUMENT

i. THE DEEMED ADMISSIONS ARE PROPERLY WITHDRAWN

Defendant maintains that he never received Plaintiff's alleged Request for Admissions. Plaintiff's counsel refuses to produce them to Defendant.

Nevertheless, as soon as Defendant learned of the RFA's he responded to it, and denied them

¹³A true and correct copy of Cohen's 9-11-2019 letter to Berliani is attached hereto as Exhibit “13” and is incorporated herein by this reference.

¹⁴A true and correct copy of Cohen's 9-17-2019 meet & confer letter to Plaintiff and the *Proposed Joint Stipulation in Connection with Defendant's Motion to Allow Withdrawal of Deemed Admissions F.R.C.P. § 36(B)* is attached hereto as Exhibit “14” and is incorporated herein by this reference.

¹⁵A true and correct copy of Plaintiff's 9-17-2019 letter is attached hereto as Exhibit “15” and is incorporated herein by this reference.

1 substantively and produced the evidence to support those denials. Under applicable law: If a matter
2 is not admitted, the answer must specifically deny it or state in detail why the answering party cannot
3 truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good
4 faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify
5 the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or
6 information as a reason for failing to admit or deny only if the party states that it has made reasonable
7 inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or
8 deny. F.R.C.P. § 36(a)(4).

9 Despite the self-executing nature of Rule 36 with regard to the automatic admission of
10 untimely responses, the Ninth Circuit has long recognized the district court's discretion to permit late
11 responses to requests for admission. See, e.g., *French v. United States*, 416 F.2d 1149, 1152 (9th
12 Cir. 1968) ("A trial judge has discretion to permit a late response to a request for admissions made
13 pursuant to [Rule 36], and thus relieve a party of apparent default.") The language of Rule 36(a)
14 provides a court with discretion to extend the time for responding to requests for admissions, even
15 after the time to respond has expired. Fed. 1 R. Civ. P. 36(a)(3) ("A shorter or longer time for
16 responding may be stipulated to under Rule 29 or be ordered by the court.").

17 Discretion also requires the Court to examine competing factors and interests. The Court must
18 weigh the public policy favoring the disposition of cases on their merits rather than on technical
19 violations of procedural rules, consider the scope and purpose of the Federal Rules of Civil Procedure,
20 and assess the particular circumstances presented. Defendant asserts that if the RFAs are deemed
21 admitted the result is essentially a case-terminating sanction as the RFAs eviscerate Defendant's case
22 and will prevent the matter from being decided on the merits. The Ninth Circuit has repeatedly held,
23 in a variety of procedural contexts, that the public policy favoring disposition of cases on their merits
24 strongly counsels against dismissal of a case or sanctions that are ultimately case-terminating. See,
25 e.g., *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006).

26 Further, the Rules of Civil Procedure explicitly counsel that the rules are to "be construed and
27 administered to secure the just, speedy, and inexpensive determination of every action and
28

proceeding." Fed. R. Civ. P. 1. Here, the responses were done at the first opportunity once Defendant learned of them. Allowing a technical violation of this nature to drive the resolution of the matter essentially deprives Defendant of a merits-based decision. Construing Rule 36 in this manner would not comport with the scope and purpose of the Rules.

Beyond this, even assuming that Defendant is incorrect in his assertion that the admissions are case-terminating, the circumstances of this case weigh in favor of relieving Defendant of his late responses. Allowing Defendant to respond to the RFAs can be construed as an agreement to waive the original untimeliness.

When undertaking a prejudice inquiry under Rule 36(b), district courts should focus on the prejudice that the nonmoving party would suffer at trial." *Sonoda v. Cabrera*, 255 F.3d 1035, 1039-40 (9th Cir. 2001), where the court granted the motion to withdraw the admissions because it was made before trial and the propounding party would not have been hindered in presenting its evidence. The Ninth Circuit has held that "reliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice." *Conlon*, 474 F.3d at 623. The Ninth Circuit likewise concluded that when deemed admissions resulted in another party choosing not to engage in other discovery, it did not amount to prejudice. It specifically noted that under those circumstances, the district court has the option of re-opening the discovery.

Courts have stressed that a deemed admission can only be withdrawn or amended by motion in accordance with F.R.C.P. § 36(b). *American Auto.*, 930 F.2d at 1120. In order to allow withdrawal of a deemed admission, F.R.C.P. § 36(b) requires that a trial court find that withdrawal or amendment: 1) would serve the presentation of the case on its merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case. *American Auto.*, 930 F.2d at 1119 (citations Omitted); F.R.C.P. § 36(b). Even when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission. *United States v. Kasuboski*, 834 F.2d 1345, 1350 n. 7 (7th Cir. 1987) ("[R]ule 36(b) allows withdrawal of admissions if certain conditions are met and the district court, in its discretion, permits the withdrawal."); *Donovan v. Carls*

1 *Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) ("Because the language of [Rule 36(b)] is
2 permissive, the court is not required to make an exception to Rule 36 even if both the merits and the
3 prejudice issues cut in favor of the party seeking exception to the rule.").

4 Two requirements, therefore, must be met before an admission may be withdrawn: (1)
5 presentation of the merits of the action must be subserved, and (2) the party who obtained the
6 admission must not be prejudiced by the withdrawal. Both requirements are met here. Defendant has
7 presented his defenses to this lawsuit on 8-9-2019, Defendant has sent Plaintiff his response to the
8 RFA's, and Plaintiff cannot possibly claim that he has been prejudiced by the withdrawal, especially
9 in light of the fact that Plaintiff failed to prove that he first served Initial Disclosures in the case.

10 Defendant has shown that the proposed response to admissions are contrary to the record or
11 that circumstances relating to the deemed admissions. More importantly, Defendant had no earlier
12 opportunity to submit his responses to Plaintiff's discovery requests - because he never received them
13 and because his former lawyer never sent them to him. Defendant seized the opportunity to respond
14 to them as soon as he learned of them.

15 Accordingly, permitting withdrawal of Defendant's deemed admissions would promote the
16 presentation of the merits of case, as the admissions constitute competent evidence capable of
17 defeating the Plaintiff's claim.

18 ii. **PLAINTIFF'S DISCOVERY IS PREMATURE UNDER THE FEDERAL**
19 **RULES OF CIVIL PROCEDURE**

20 Under F.R.C.P. § 26(d)(1), discovery is not permitted without a court order prior to a
21 conference between the parties as required by F.R.C.P. § 26(f). *AF Holdings LLC v. DOES 1-96*,
22 2011 WL 4502413 (N.D. Cal. 2011); See also, F.R.C.P. § 26(d)(1) ("A party may not seek discovery
23 from any source before the parties have conferred as required by Rule 26(f), except in a proceeding
24 exempted from initial disclosure under F.R.C.P. § 26(a)(1)(B), or when authorized by these rules,
25 by stipulation, or by court order.") "By its express terms, Rule 26(d) bars discovery until after the
26 parties have conferred about a discovery plan as directed by Rule 26(f)." *Riley v. Walgreen Co.*, 233
27 F.R.D. 496, 498 (S.D. Tex. 2005). "Rule 26(d)'s proscription sweeps broadly: not only may a party
28

1 not 'serve' discovery, it may not even 'seek' discovery from any source until after the Rule 26(f)
2 conference." Id. at 499.2 A Rule 26(f) scheduling conference has not been held, and discovery is not
3 yet open. See *Xcentric Ventures, LLC v. Richeson*, 2010 WL 5276950 (D. Ariz. 2010) (holding that
4 prior to a Rule 26(f) conference, a request for discovery was propounded "before the Federal Rules
5 of Civil Procedure permitted [the plaintiff] to do so.") Accordingly, Plaintiff's efforts to obtain
6 discovery, formally or informally, are premature.

7 If Plaintiff actually issued *Initial Disclosures*, he should have simply produced a copy to
8 Cohen upon requesting it two times. Instead, Plaintiff stonewalled and refused to produce it. By virtue
9 of Plaintiff's refusal to show that he indeed actually issued *Initial Disclosures*, we are left to conclude
10 that he did not, and therefore the RFA's are premature and unauthorized. The Court cannot deem them
11 admitted accordingly.

12 Pursuant to LBR 7026-1(c)(2), Defendant met and conferred with Plaintiff at least twice trying
13 to resolve this simple discovery matter (to no avail).

14 Pursuant to LBR 7026-1(c)(3), the Proposed Joint Stipulation is attached to this motion.

15 **iii. SANCTIONS ARE PROPERLY AWARDED TO DEFENDANT**

16 Pursuant to LBR 7026-1(c)(4), Cooperation of Counsel; Sanctions. The failure of any counsel
17 either to cooperate in this procedure, to attend the meeting of counsel, or to provide the moving party
18 the information necessary to prepare the stipulation required by this rule within 7 days of the meeting
19 of counsel will result in the imposition of sanctions, including the sanctions authorized by F.R.B.P.
20 7037 and LBR 9011-3.

21 This Court can impose sanctions under its inherent power. *Chambers v. NASCO*, 501 U.S. 32,
22 45-46 (1991).

23 "Congress impliedly recognized that bankruptcy courts have the inherent power to
24 sanction that Chambers recognized exists within Article II courts." *In re Rainbow*
25 *Magazine*, 77 F.3d 278 (9th Cir. 1996) (sanctions under the Court's inherent power are
26 permitted if "preceded by a finding of bad faith, or conduct tantamount to bad faith,"
such as recklessness "combined with an additional factor such as frivolousness,
harassment, or an improper purpose"); *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir.
2001); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001).

27 **iv. MONEY SANCTIONS ARE PROPERLY AWARDED TO DEFENDANT**

Reasonable attorney's fees and costs against a party and/or his counsel have been awarded under the judiciary's inherent power in a number of circumstances, including where a party: (1) fabricates evidence. *Dollar Sys. v. Avcar Leasing Sys.*, 890 F.2d 165, 175-76 (9th Cir.1989), (losing party's attempt to fabricate a disclosure date revealed bad faith conduct justifying an award of attorneys' fees); (2) intentionally spoliates relevant evidence. *Leon v. IDX Sys.*, 464 F.3d 951, 959, 961 (9th Cir. 2006) (intentionally deleting over 2,000 files from his employer-issued laptop during his lawsuit against employer warranted dismissal of plaintiff's lawsuit and monetary sanctions [attorneys' fees and costs for investigating and litigating spoliation issue]).

An award of expenses does not require a showing of willfulness or improper intent. Rather, the standard is whether there was substantial justification for the losing party's conduct. *Reygo Pac. Corp. v. Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982). In this case, there wasn't.

The Court retains broad discretion to control its dockets and in the exercise of that power they may impose sanctions. *Adams v. Cal. Dept. of Health Services*, 487 F.3d 684, 688 (9th Cir. 2007); *Thompson v. Housing Authority of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). Further, "a court certainly may assess sanctions against counsel who willfully abuse judicial processes." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001).

Defendant incurred 5 hours in preparation of this motion (\$2,750.00). Counsel's hourly rate is \$550.00 per hour. He anticipates another 2 hours in reviewing Defendants' opposition (\$1,100.00), another 2 hours in preparing a Reply (\$1,100.00), and another 3 hours for attending the hearing (\$1,650.00) totaling **\$6,600.00**.

Accordingly, monetary sanctions sought by Plaintiffs in connection with this Motion should be imposed against Defendants with said amount to be made payable to Plaintiffs' attorney, within ten days.

c. **CONCLUSION**

For all of the foregoing reasons, the Court should grant Defendant's Motion and award to Defendant his attorneys' fees, costs and disbursements; and grant to Defendant any further relief as to the Court seems appropriate.

1 DATED: January 22, 2020

LAW OFFICE OF BARUCH C. COHEN, APLC

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By /S/ Baruch C. Cohen

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Baruch C. Cohen, Esq.

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Attorney For Defendant Nicholas Silao

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DECLARATION OF BARUCH C. COHEN

I, BARUCH C. COHEN, declare as follows:

2. The facts stated below are true and correct within the best of my personal knowledge and if called upon to testify to them I could and would competently do so.

3. I am a member in good standing and eligible to practice before the following court(s): California State Supreme Court; US Court of Appeals - Ninth Circuit; Bankruptcy Appellate Panel; United States District Courts: Central District of CA; Eastern District of CA; Northern District of CA; & Southern District of CA.

4. I am the principal shareholder and President of The Law Office of Baruch C. Cohen. A Professional Law Corporation, located at 4929 Wilshire Boulevard, Suite 940, Los Angeles, California 90010.

5. I proudly represent Defendant Nicholas Silao.

6. This Declaration is in support of **DEFENDANT'S MOTION TO ALLOW WITHDRAWAL OF DEEMED ADMISSIONS F.R.C.P. § 36(B)**.

7. On 11-8-2017, the Debtor Pandora Hospice Care, Inc., commenced this bankruptcy proceeding Case No. 6:17-bk-19336-SY.

8. On 10-2-2018, Plaintiff filed this adversary action entitled: *Karl T. Anderson against Nicholas Silao*, Adversary case 6:18-ap-01193 [Doc-1]

9. On 10-31-2018, Defendant, represented by Sanaz S. Bereliani filed an Answer to the Complaint [Doc-4].

10. On 1-2-2019, the parties filed a Joint Status Report [Doc-5]. Of particular interest, in Section A4 of the Joint Status Report the parties acknowledged that they did **not** meet & confer pursuant to LBR 7026-1.¹⁶

11. Pursuant to the Status Conference and Scheduling Order Pursuant to LBR 7016-1(a)(4) [Doc-10], the discovery cutoff was 6-28-2019, the pre-trial stipulation was due 8-1-2019, the

¹⁶A true and correct copy of the 1-2-2019 Joint Status Report [Doc-5] is attached hereto as Exhibit "1" and is incorporated herein by this reference.

pretrial hearing was 8-15-2019, and the mediation completion date was 7-31-2019.

12. On 3-15-2019, Defendant's counsel Berliani moved to withdraw as counsel of record [Doc-12], and on 4-16-2019, the Court entered its Order Granting Motion To Withdraw As Counsel Of Record [Doc-16].

13. On 8-7-2019 at 10:42am, Defendant wrote Berliani (copying Cohen) and demanded his file from her pursuant to the California Rule of Professional Responsibility 4-100(B)4, that provides that an attorney must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.¹⁷

14. On 8-7-2019, at 2:18pm, Berliani wrote back: " Not much - Nick went MIA on us shortly after the beginning and we just bought him time with the Tee's attorney... " and sent the following 12 documents: (1) The Complaint; (2) Your Retainer Agreement; (3) A Waiver of Conflict of Interest for a Joint Representation signed by Nick Silao; (4) A Waiver of Conflict of Interest for a Joint Representation signed by Ray Silao; (5) A Paypal receipt of Nick's payment to you; (6) the Answer to the Complaint; (7) Another copy of the Answer to the Complaint; (8) the filed JSR; (9) the filed Scheduling Order; (10) a blank form Substitution of Attorney; (11) the Order Granting your Motion to Withdraw; & (12) the LOU receipt of her Order Granting her Motion to Withdraw.¹⁸

15. On 8-8-2019, at 6:53am, I wrote Berliani: "Thx for the prompt reply. Did Plaintiff send you Plaintiff's FRCP 26 Initial Disclosures? If so, please send it. Was any discovery done in this adversary? If so, please send them."¹⁹

¹⁷A true and correct copy of Defendant's 8-7-2019 letter to Berliani (copying Cohen) demanding his file from her pursuant to the California Rule of Professional Responsibility 4-100(B)4 is attached hereto as Exhibit "2" and is incorporated herein by this reference.

¹⁸A true and correct copy of Berliani's 8-7-2019 letter to Defendant (copying Cohen) is attached hereto as Exhibit "3" and is incorporated herein by this reference.

¹⁹A true and correct copy of Cohen's 8-8-2019 letter to Berliani is attached hereto as Exhibit "4" and is incorporated herein by this reference.

1 16. On 8-8-2018⁹ at 8:216am, Berliani responded: "Per my previous email, there was no
2 communication by your client so no nothing further was done. They retained me on a limited
3 scope and were not in touch after with further instruction or guidance. I recommend calling
4 Trustees counsel regarding case status, I'm surprised they haven't filed anything else yet.
5 Nick got lucky."²⁰

6 17. On 8-8-2019 (late at night), Defendant retained me, and I filed the *Substitution of Attorney*
7 [Doc-25] on 8-12-2019.

8 18. Before being retained, I specifically inquired of Defendant and Ms. Bereliani whether they
9 received any discovery from Plaintiff in this adversary, whether they received a proposed
10 Joint Pre-Trial from Plaintiff, & whether they received any FRCP 26 Initial Disclosures from
11 Plaintiff. While Ms. Bereliani withdrew from the case in 4-16-2019, I still inquired of her too,
12 just in case. Both Ms. Bereliani & Defendant informed me that they did not receive any of the
13 aforementioned from Plaintiff. On that basis, I took the case.

14 19. I was prepared to file a declaration pursuant to LBR 7016-1(E)(2), when I checked PACER
15 and discovered Plaintiff's Unilateral Pre Trial and Declaration filings of 8-8-2019, and was
16 surprised, to see that Plaintiff claimed that he indeed propounded discovery to Defendant -
17 Request for Admissions ("RFA's") and that Defendant did not respond, and Plaintiff is
18 deeming the following admissions, admitted:

19 a. RFA # 4. The Debtor loaned/transferred \$137,000 to Defendant, Nicholas Silao. The
20 Debtor's 2016 Federal Income Tax Returns signed under penalty of perjury reflected
21 the outstanding loan owed by Defendant, Nicholas Silao to the Corporate Debtor.
22 (Unresponded to Request for Admission No. 1).

23 b. RFA # 5. Pursuant to the Debtor's 2016 Federal Income Tax Returns, Defendant,
24 Nicholas Silao owes the Plaintiff/Chapter 7 Trustee no less than \$137,000, plus any
25 and all costs of collection. (Unresponded to Request for Admission No. 4).

27 ²⁰A true and correct copy of Berliani's 8-8-2019 letter to Cohen is attached hereto as Exhibit
28 "5" and is incorporated herein by this reference.

- 1 c. RFA # 6. Plaintiff/Chapter 7 Trustee is entitled to pre-judgment interest as provided
2 under applicable non-bankruptcy law (Unresponded to Request for Admission No. 5).
3 d. RFA # 7. Defendant, Nicholas Silao has no defenses and/or counterclaims to
4 Plaintiff/Chapter 7 Trustee's demand for \$137,000. (Unresponded to Request for
5 Admission No. 6).
6 e. RFA # 8. Defendant, Nicholas Silao has no facts that dispute Plaintiff/Chapter 7
7 Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint.
8 (Unresponded to Request for Admission No. 7).
9 f. RFA # 9. Defendant, Nicholas Silao has no documents, notes or other writings that
10 disputes the Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint.
11 (Unresponded to Request for Admission No. 8).
12 g. RFA # 10. Defendant, Nicholas Silao has no witnesses that dispute the Trustee's
13 entitlement to \$137,000 demanded in the Trustee's Complaint. (Unresponded to
14 Request for Admission No. 9).²¹

15 20. On 8-9-2019 at 6:34am, I wrote Berliani informing her that Plaintiff's Unilateral Pretrial stated
16 that he indeed propounded discovery Request for Admissions ("RFA's") to the Defendant, that
17 Defendant did not respond to, and that they are now deemed admitted. I asked Berliani why
18 wasn't I given copies of this discovery?"²²

19 21. On 8-9-2019 at 12:17pm, Berliani responded: "Ps I'll speak to my office regarding receipts
20 of anything on their end but please note we were retained specifically for an answer and joint
21 status report and conference. We had no further involvement or guidance. Lastly, I appreciate
22 your professionalism going forward."

23 22. On Friday 8-9-2019 at 11:22am, I wrote Plaintiff's counsel to meet & confer regarding
24

25 ²¹A true and correct copy of Plaintiff's 8-8-2019 Unilateral Pretrial & Declaration is attached
26 hereto as Exhibit "6" and is incorporated herein by this reference.

27 ²²A true and correct copy of Cohen's 8-9-2019 letter to Berliani is attached hereto as Exhibit
28 "7" and is incorporated herein by this reference.

1 Plaintiff's *Unilateral Pre Trial* [Doc-23] and *Declaration* [Doc-24] in advance of the
2 upcoming Pre Trial hearing of 8-22-2019.²³

3 23. Specifically, I asked Plaintiff's counsel: (1) to see Plaintiff's F.R.C.P. 26 Initial Disclosures;
4 (2) to See Plaintiff's Discovery; (3) to show Plaintiff that Defendant has evidence to dispute
5 Plaintiff's turnover claim for \$137,000.00; & (4) to seek clarification regarding Plaintiff's
6 efforts to meet & confer with Defendant regarding the Joint Pre-Trial Report.

7 24. On Sunday 8-11-2019, Plaintiff's counsel emailed me stating: "*Thanks for your email. Please*
8 *know I will not litigate this matter via email, thus if you believe your client is entitled to relief*
9 *from the Court, please file a properly noticed motion pursuant to the Local Bankruptcy Rules.*
10 *Consequently, at this point we are proceeding in the ordinary course pursuant to the Court's*
11 *presently set scheduling order. Finally, if you intend to proceed with any type of judicial*
12 *relief, please note I'll be traveling to and from Shanghai China for my son's college freshman*
13 *activities between the afternoon of August 22 and returning to the OC on or about August 29,*
14 *2019, thus we will object to any relief that requires my office to take action during that time*
15 *period. Thank you.*"²⁴

16 25. This was a strange response to my meet & confer letter of 8-9-2019 for the following reasons:
17 a. Regarding my simple request to see Plaintiff's F.R.C.P. 26 Initial Disclosures, I asked
18 counsel whether he met & conferred and served the Defendant, with Plaintiff's
19 F.R.C.P. 26 Initial Disclosures, and if he did, to please send Cohen a copy, because
20 as the Court knows, F.R.C.P. 26(d)(1) prohibits discovery **before** the parties have met
21 & conferred as required by F.R.C.P. 26(f). Further, as the Court knows, F.R.C.P. §
22 26(a)(1)© requires a plaintiff to make the initial disclosures at or within 14 days after
23 the parties' Rule 26(f) conference. In Plaintiff's 1-2-2019 Status Conference Report
24

25 ²³A true and correct copy of Cohen's 8-9-2019 meet & confer letter to Plaintiff's counsel is
26 attached hereto as Exhibit "8" and is incorporated herein by this reference.

27 ²⁴A true and correct copy of Plaintiff's counsel's email of 8-11-2019 is attached hereto as
28 Exhibit "9" and is incorporated herein by this reference.

1 [Doc-5], Section A4 of the Joint Status Report the parties acknowledged that they did
2 not meet & confer pursuant to LBR 7026-1, and Plaintiff pledged to meet and confer
3 by 1-17-2019. Plaintiff's Initial Disclosures were due by 1-31-2019. So I inquired
4 whether Plaintiff met & conferred before or after the 1-17-2019 date. So I merely
5 asked to see Plaintiff's compliance with his F.R.C.P. 26 Disclosures requirement. To
6 my surprise, rather than simply send them to me, Plaintiff stonewalled me with his
7 non-response of 8-11-2019. So I had no copy of Plaintiff's F.R.C.P. 26 Initial
8 Disclosures to work from.

9 b. Regarding my simple request to see Plaintiff's discovery, I informed Plaintiff that
10 Defendant informed me that he does not recall receiving any discovery from Plaintiff,
11 let alone RFA's, and inquired whether Plaintiff's discovery was propounded before or
12 after the 6-28-2019 Discovery Cutoff date? And if so, to please provide me with
13 copies of the propounded discovery so that I can respond to them. I also asked that
14 Plaintiff stipulate to withdraw the deemed status and allow Defendant to respond to
15 them. To my surprise, rather than simply send them to me, Plaintiff stonewalled me
16 with his non-response of 8-11-2019. So I did not have a copy of Plaintiff's discovery
17 to work from.

18 c. Regarding my simple request for clarification regarding Plaintiff's efforts to meet &
19 confer with Defendant regarding the Joint Pre-Trial Report, I reported to counsel that
20 his Declaration in support of the Unilateral Pre Trial states that "On or about July 22,
21 2019, I called the telephone number listed on the adversary proceeding docket's cover
22 page and left a message, but no return call; or email was received by Defendant
23 Nicholas Silao," and that Defendant informed me that he does not recall receiving any
24 such telephone call from Plaintiff. I expressed to counsel concern with Plaintiff's
25 claim of a 7-22-2019 telephone call, because as the Court is aware, LBR
26 7016-1(b)(1)© requires that the parties must meet and confer at least 28 days before
27 the date set for pretrial conference, the pretrial hearing was 8-22-2019, and the 28-day
28

meet & confer deadline was 7-5-2019, meaning that Plaintiff's attempted meet & confer of 7-22-2019 was not timely.

d. I expressed to Plaintiff my additional concern with why his declaration fails to state that he emailed the proposed Joint Pre Trial to Defendant that is listed in the *Order Granting Bereliani's Motion to Withdraw as Counsel of Record* [Doc-16] and in the PACER docket [nsilao@aol.com?](mailto:nsilao@aol.com)

e. I expressed to Plaintiff my additional concern with Plaintiff's Declaration in support of the Unilateral Pre Trial that states: "On or about July 29, 2019, my office sent Defendant Nicholas Silao at the address listed on the adversary proceeding docket via Federal Express delivery the Joint PreTrial Stipulation." I informed counsel that Defendant claims and insists that he does not recall receiving any such Joint Pre Trial Stipulation, and I requested that Plaintiff provide me with his 7-29-2019 letter, the FEDEX slip, and the proposed JPS of 7-29-2019. To my surprise, rather than simply send them to me, Plaintiff stonewalled him with his non-response of 8-11-2019. So I had no copy of Plaintiff's Joint Pretrial that he allegedly sent to work from.

26. Regarding the last point of my letter to demonstrate that Defendant has evidence to dispute Plaintiff's turnover claim for \$137,000.00, that he has witnesses and exhibits re same, I produced these documents to counsel sight unseen, without the Plaintiff having to formally demand them from Defendants to substantiate Defendant's claim that he has exhibits to support his defense:

a. RFA # 4. The Debtor did not lend \$137,000 to Defendant. The facts will reveal just the opposite: My client lent Pandora \$442, 00.00.

b. RFA # 5. Defendant does not owe the Plaintiff \$137,000 (plus any and all costs of collection).

c. RFA # 6. Plaintiff is not entitled to pre-judgment interest as provided under applicable non-bankruptcy law.

d. RFA # 7. Defendant, Nicholas Silao has defenses to Plaintiff's demand for \$137,000,

as raised in Defendant's *Answer* [Doc-4]. Again, the Debtor did not lend \$137,000 to Defendant. The facts will reveal just the opposite: My client lent Pandora \$442,000.00.

e. RFA # 8. Defendant has facts that dispute Plaintiff's entitlement to \$137,000 demanded in the Trustee's Complaint.

f. RFA #9. Defendant has documents, notes or other writings that dispute the Plaintiff's entitlement to \$137,000 demanded in the Trustee's Complaint.

27. Regarding the exhibits, Cohen presented to Plaintiff:

a. Pandora's loan report to the Silao brothers reflecting that during the period of 12-16-2013 - 5-20-2015, Defendant lent Pandora approximately \$442,000.00 (and that his brothers Michael Silao lent Pandora \$70,000.00, Sam Silao lent Pandora \$6,000.00, & Ray Silao lent Pandora \$143,911.37, totaling \$662,411.37).

b. The last page of Pandora's **2014** tax return (**FYE 12-31-2014**) Form 1120, Page 5, Schedule L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed \$389,750.00 by Pandora for that year ("Loan Payable N Silao");

c. The last page of Pandora's **2015** tax return (**FYE 12-31-2015**) Form 1120, Page 5, Schedule L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed between \$389,750.00 - \$297,250.00 by Pandora for that year ("Loan Payable N Silao");

d. Pandora's Balance Sheet as of **12-31-2015**, under the section entitled: "Liabilities & Equity" reflecting "Loan/Financing Payable N. Silao \$297,250.00;

e. The last page of Pandora's **2016** tax return (**FYE 12-31-2016**) Form 1120, Page 5, Schedule L, Line 19, entitled: "*Loans from Shareholders*" showing that my client was owed between \$297,250.00 - \$295,250.00 by Pandora for that year ("Loan Payable N Silao");

f. Pandora's (9) checks to my client that contain the notation: "Reimbursement - Loan:"

i. Pandora's 7-31-2015 check # 9001 to Defendant for \$25,000.00;

- 1 ii. Pandora's 9-4-2015 check # 9002 to Defendant for \$25,000.00 contains the
- 2 notation: "Loan Repayment;"
- 3 iii. Pandora's 9-15-2015 check # 1112 to Defendant for \$2,500.00 contains the
- 4 notation: "Reimbursement - Loan;"
- 5 iv. Pandora's 10-9-2015 check # 9003 to Defendant for \$25,000.00 contains the
- 6 notation: "Loan Repayment;"
- 7 v. Pandora's 10-15-2015 check # 1130 to Defendant for \$2,500.00 contains the
- 8 notation: "Reimbursement;"
- 9 vi. Pandora's 11-1-2015 check # 1131 to Defendant for \$2,500.00 contains the
- 10 notation: "Reimbursement;"
- 11 vii. Pandora's 11-2-2015 check # 0005 to Defendant for \$25,000.00 contains the
- 12 notation: "Loan Repayment;"
- 13 viii. Pandora's 12-1-2015 check # 1132 to Defendant for \$2,500.00 contains the
- 14 notation: "Reimbursement;"
- 15 ix. Pandora's 12-2-2015 check # 8655 to Defendant for \$25,000.00 contains the
- 16 notation: "Loan Repayment."

17 28. Regarding the witnesses, I disclosed to counsel: RFA # 10. Defendant **has** witnesses that
18 dispute the Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint:
19 Defendant; the other Silao brothers; Pandora's CPA Rufino Reyes Magpayo.

20 29. My letter recommended that the parties push "reset" on this case: (1) so that Plaintiff can
21 provide me with all of the above-requested documents; (2) to stipulate to withdraw the
22 deemed admissions; (3) to allow Defendant to respond to Plaintiff's discovery; (4) to allow
23 Defendant to participate meaningfully to the Joint Pre Trial report; & (5) to stipulate to
24 continue the pre-trial to a mutually agreeable date. I concluded that I believe that the Court
25 would prefer to try the case on the merits rather than granting the Plaintiff defaults against an
26 *in pro per* defendant based on the above. I was even so bold as to suggest that since Plaintiff's
27 case appears to be solely predicated on a 2016 tax return, that upon Plaintiff verifying the
28

1 Defendant's evidence, that the Plaintiff consider dismissing this adversary complaint. I truly
2 believed I was being completely reasonable and practical, given the situation that I found
3 myself in. My requests to see Plaintiff's Initial Disclosures, Discovery, and proof of his meet
4 & confer compliance, are completely legitimate, not being made for any improper⁴ purpose.
5 One would think, that a Plaintiff would agree to produce the aforementioned and stipulate to
6 continue the pretrial - especially in light of his late compliance with LBR 7016-1(b)(1)© - to
7 allow the defendant to participate meaningfully in his defense. Instead, and to my surprise,
8 rather than simply send them to me, Plaintiff stonewalled me with his non-response of 8-11-
9 2019.

10 30. On 9-4-2019, I wrote Plaintiff again. " am writing you to meet & confer regarding: (1) the
11 proposed Joint Pre Trial Stipulation; (2) the proposed Motion in Limine, & (3) the proposed
12 Motion to Withdraw the Deemed Admissions pursuant to F.R.C.P. § 36(b). As I wrote you
13 on 8-9-2019, I'm running blind here, because I do not have: (1) Plaintiff's F.R.C.P. 26 Initial
14 Disclosures; & (2) Plaintiff's written discovery including Plaintiff's Request for Admissions
15 ("RFA's"). Both Ms. Bereliani and my client informed me that they do not have copies of
16 them. Accordingly, please provide them to me. If I do not receive them from you, I will have
17 no choice but to file the proposed motions. As I indicated in Defendant's 8-12-2019 Unilateral
18 Pre-Trial Report [Doc-28], Defendant intends to file a Motion in Limine to exclude Plaintiff's
19 evidence at trial, based on Plaintiff's failures to comply with FRCP 26. Your cooperation in
20 providing me with the requested documents will impact greatly on whether I will file the
21 Motion in Limine or not. I also indicated that Defendant intends to file a Motion to Withdraw
22 the Deemed Admissions pursuant to F.R.C.P. § 36(b), based on my client's representation that
23 he never received Plaintiff's (alleged) Request for Admissions. Please advise if Plaintiff will
24 stipulate to withdraw the deemed admissions and I will gladly prepare the stipulation and
25 order. To expedite the process, enclosed please find Defendant's Verified Response to
26 Request for Admissions that is based on Plaintiff's Unilateral PreTrial Report that identified
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28

1 the six (6) Requests for Admission.²⁵

2 31. On 9-11-2019, Plaintiff responded: “Baruch, I never received a response from you last week
3 regarding the Meet and Confer issues noted in your 9/4/11 faxed letter. I had proposed a
4 "Meet and Confer" telephone call for Friday September 6, 2019 but never heard back from
5 you. Secondly, I don't understand the legal effect if any of the verified responses included with
6 your 9/4/19 fax. Rather, I've enclosed the RFAs that were properly served on your client's
7 former counsel at her address of record in the above-captioned Adversary proceeding. Thus
8 pursuant to F.R.C.P. 36 (made applicable to this Adversary Proceeding per Rule 7036 of the
9 Fed Rules of Bankr Procedure) the unresponded to RFAs are still, enforceable and we intend
10 to use them until there's a court order to the contrary. Any questions or comments, please let
11 me know. thanks.” Plaintiff attached a copy of an RFA.²⁶

12 32. On 9-11-2019, I responded: “Tom: I do not recall you proposing, and me accepting, a
13 proposed meet & confer with me on 9-6-2019. But I'm happy to do so immediately. I also
14 want to state emphatically, that Berliani did not share your RFA with me, and that Nick Silao
15 swears over a stack of bibles that he never received them. Finally, I need to see your Initial
16 Disclosures. As I’m sure you know, F.R.C.P. 26(d)(1) prohibits discovery before the parties
17 have met & conferred as required by F.R.C.P. 26(f). If you did not do a F.R.C.P. 26 Initial
18 Disclosure, the RFA's would be improper. If you did do a F.R.C.P. 26 Initial Disclosure,
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20
21

22 ²⁵A true and correct copy of Cohen’s 9-4-2019 Meet & Confer letter Re: Proposed Joint Pre
23 Trial Stipulation; Proposed Motion in Limine, & Proposed Motion to Withdraw the Deemed
24 Admissions pursuant to F.R.C.P. § 36(b) and Defendant’s Verified Response to Request for
25 Admissions that is based on Plaintiff’s Unilateral PreTrial Report that identified the six (6) Requests
26 for Admission is attached hereto as Exhibit “10” and is incorporated herein by this reference.

27 ²⁶A true and correct copy of Plaintiff’s counsel’s email of 9-11-2019 is attached hereto as
28 Exhibit “11” and is incorporated herein by this reference. While Defendant’s counsel would not
accuse Plaintiff’s counsel of forging the Request for Admission, one can easily be generated, and
backdated, without any independent way of verifying that it is authentic. Of particular note is that
Plaintiff presented no proof that the RFA was actually mailed to Berliani.

1 please provide it to me. I've now asked you for this twice.”²⁷

2 33. On 9-11-2019 I wrote Berliani informing her that Plaintiff sent me an RFA that purports to
3 have been served on her office on 3-7-2019 at your address "Sanaz S. Bereliani, Bereliani
4 Law Firm, 11400 W. Olympic Blvd., Suite 200, Los Angeles, CA 90064. On 3-15-2019, she
5 moved to withdraw as counsel to Defendant. So she must have had the 3-7-2019 RFA's in her
6 file before she moved to withdraw on 3-15-2019. Yet, she did not produce it to Defendant or
7 to me in violation of Rule 4-100(b)(4). I was very concerned that she had this RFA in her file
8 and did not produce it when Defendant demanded it. So I asked her again: “Did Plaintiff send
9 you Plaintiff's FRCP 26 Initial Disclosures? If so, please send it. Was any discovery done in
10 this adversary? If so, please send them.” I was very concerned that now the RFA's are deemed
11 admitted, and Defendant will now have to spend money to file a Motion to have the Deemed
12 Admissions Withdrawn, which he should not have to do, had she forwarded to him the RFA's
13 when you received it on 3-7-2019.²⁸

14 34. On 9-12-2019, I spoke with Berliani, who represented that the only documents she had in her
15 file were those that she forwarded to me earlier. When pressed again whether she had the RFA
16 in her file and whether she had Plaintiff's FRCP 26 Initial Disclosures, she repeated again,
17 that the only documents she had in her file were those that she forwarded to me earlier.

18 35. On 9-17-2019, I wrote Plaintiff's counsel to meet & confer and sent him a *Proposed Joint*
19 *Stipulation in Connection with Defendant's Motion to Allow Withdrawal of Deemed*
20 *Admissions F.R.C.P. § 36(B)* (“Proposed Joint Stipulation”).²⁹

21 36. On 9-17-2019, Plaintiff's counsel wrote back declining to participate in the Proposed Joint

22
23 ²⁷A true and correct copy of Cohen's 9-11-2019 letter to Plaintiff is attached hereto as Exhibit
“12” and is incorporated herein by this reference.

24 ²⁸A true and correct copy of Cohen's 9-11-2019 letter to Berliani is attached hereto as Exhibit
25 “13” and is incorporated herein by this reference.

26 ²⁹A true and correct copy of Cohen's 9-17-2019 meet & confer letter to Plaintiff and the
27 *Proposed Joint Stipulation in Connection with Defendant's Motion to Allow Withdrawal of Deemed*
28 *Admissions F.R.C.P. § 36(B)* is attached hereto as Exhibit “14” and is incorporated herein by this
reference.

1 Stipulation.³⁰

2 37. On 9-25-2019, Defendant filed a Motion Defendants Motion To Allow Withdrawal Of
3 Deemed Admissions F.R.C.P. 36(B)[Doc-31].

4 38. On 11-26-2019, This Court entered it's Order Denying Motion To Allow Withdrawal Of
5 Deemed Admissions [Doc-33] on the sole basis that the parties did not meet and confer by
6 telephone.

7 39. On 11-27-2019 I wrote Plaintiff's counsel to meet and confer by telephone, which we did on
8 12-5-2019. All things being equal, I explained to Plaintiff's counsel the above, and pointed
9 out that if Plaintiff failed to issue FRCP 26 Initial Disclosures that he would have entitled him
10 to conduct discovery. I asked Plaintiff's counsel several times in the meet & confer
11 conversation to show me Plaintiff's FRCP 26 Initial Disclosures.

12 40. On 12-16-2019, Plaintiff's counsel sent me his contribution to the **PROPOSED JOINT**
13 **STIPULATION IN CONNECTION WITH DEFENDANT'S MOTION TO ALLOW**
14 **WITHDRAWAL OF DEEMED ADMISSIONS F.R.C.P. § 36(B)**, which I incorporated,
15 and on 12-18-2019, Plaintiff's counsel signed it.³¹

16 41. Plaintiff's counsel only contributed to the Statement of Facts, and did not contribute to the
17 Arguments of Law and Conclusion, and did not offer a Declaration.

18 42. Bottom line, Plaintiff has still not produced to me Plaintiff's FRCP 26 Initial Disclosures that
19 would have entitled him to conduct discovery, despite being asked for this document at least
20 two times.

21
22 I declare under penalty of perjury under the laws of the United States and the State of
23 California that the foregoing is true and correct.

24 _____
25 ³⁰A true and correct copy of Plaintiff's 9-17-2019 letter is attached hereto as Exhibit "15" and
26 is incorporated herein by this reference.

27 ³¹A true and correct copy of the *Proposed Joint Stipulation in Connection with Defendant's*
28 *Motion to Allow Withdrawal of Deemed Admissions F.R.C.P. § 36(B)* is attached hereto as Exhibit
"16" and is incorporated herein by this reference.

1 DATED: January 22, 2020

2 By /S/ Baruch C. Cohen

3 Baruch C. Cohen, Esq.

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1 Sanaz S. Bereliani, SBN 256465
2 **Bereliani Law Firm, PC**
3 11400 W. Olympic Blvd., Ste 200
4 Los Angeles, CA 90064
5 Telephone: 818-920-8352
6 Fax: 888-876-0896
7 E-mail: berelianilaw@gmail.com

8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE DIVISION**

10 In re:

11 PANDORA HOSPICE CARE, INC
12 Debtor.

BK Case No.: 6:17-bk-19336-SY

Adv. Case No.: 6:18-ap-01193-SY

Chapter 7

13 KARL T. ANDERSON, CH 7 TRUSTEE,
14 Plaintiff

15 vs.

16 NICHOLAS SILAO,

17 Defendant.

**SUPPLEMENTAL DECLARATION OF
ATTORNEY SANAZ SARAH BERELIANI
DECLARATION RE DEFENDANT'S
MOTION TO ALLOW WITHDRAWAL OF
DEEMED ADMISSIONS F.R.C.P. 36(b)**

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21 I, Sanaz Sarah Bereliani, hereby declare as follows:

- 22 1. I am the former attorney for the Defendant, Nicholas Silao, in the herein Adversary
23 Complaint filed in the Debtor's Chapter 7 bankruptcy case. I am admitted to practice law
24 before this Court and all Courts in California and am a member in good standing. I have
25 personal knowledge of the facts and if called upon as a witness, I could and would
26 competently testify hereto in a court of law.
27
28

1 2. I was retained in this matter by the Defendant on October 30, 2018, for the purpose of filing an
2 Answer to an Adversary Complaint. As the Answer was due imminently, the Defendant and I
3 agreed that after the Adversary Complaint Answer was filed, we would re-negotiate the
4 retainer agreement as needed.

5 3. The Adversary Complaint Answer was filed on October 31, 2018.

6 4. I emailed the Defendant on January 2, 2019 to confirm how he wanted to proceed with regards
7 to representation and the progression of the adversary proceeding.

8 5. Shortly thereafter I spoke to the Defendant and was informed that the Defendant's mother
9 passed away. As a result, the Defendant was not able to proceed with any activity or
10 communication regarding the case until family matters were resolved. I advised Mr. Polis,
11 attorney for the Plaintiff of this on or about January 2019. I further advised the Defendant that
12 a joint status report must be filed, and an appearance at the joint status conference was
13 required.

14 6. I was then retained for the purpose of filing a Joint Status Report and an appearance at the Joint
15 Status Conference. After this, I was not successful in getting in touch with the Defendant.

16 7. On February 11, 2019, I emailed the Defendant, advising him that because of the lack of
17 communication and since he had not contemplated further representation, I was not able to
18 proceed as I could not respond on behalf of the Defendant since I did not know the further facts
19 of the case or preferred game plan of the part(ies). I provided him with a Substitution of
20 Attorney to review and sign.

21 8. At this time, on or about February 2019, I communicated with the Plaintiff that I planned on
22 withdrawing from the case due to the breakdown in communications.

23 9. For one month, my office followed up with the Defendant in regards to my email and Motion
24 to Withdraw to no avail. I never heard back from him. My last attempt was on March 13, 2019,
25 when I called and left a message for the Defendant.
26
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1 10. Due to the breakdown in communication between the Defendant and I, specifically the lack of
2 responsive communication and further retention by the Defendant, I was forced to withdraw as
3 counsel [Docket 12] and on April 16, 2019, the Court entered its Order Granting Motion to
4 Withdraw as Counsel of Record [Docket 16].

5
6 11. On or about April 11, 2019 I appeared via telephonic Courtcall for the hearing on the Motion
7 to Withdraw. At this time, the Court and Mr. Polis requested that I provide contact information
8 for the Defendant in the Order on Motion to Withdraw, so Mr. Polis could get in touch directly
9 with the Defendant. To the best of my recollection, Mr. Polis did not address the court
10 regarding discovery efforts and/or requesting any extensions on time to do discovery, given the
11 withdrawal. I was not aware of any outstanding discovery issues as of that date.

12
13 12. On or about April 26, 2019 I caused to be filed a Notice of Lodgment with an Amended Order
14 Granting the Motion to Withdraw. This document had the last known contact information for
15 the Defendant.

16 13. On or about August 7, 2019, I received an email from the Defendant, copying Attorney Cohen,
17 requesting a copy of his file. The same day I forwarded him an email with 12 attachments,
18 which include the following: (1) The Complaint; (2) Retainer Agreement; (3) A Waiver of
19 Conflict of Interest for a Joint Representation signed by Nick Silao; (4) A Waiver of Conflict
20 of Interest for a Joint Representation signed by Ray Silao; (5) A Paypal receipt of Nick's
21 payment to you; (6) the Answer to the Complaint; (7) Another copy of the Answer to the
22 Complaint; (8) the filed JSR; (9) the filed Scheduling Order; (10) a blank form Substitution of
23 Attorney; (11) the Order Granting your Motion to Withdraw; & (12) the LOU receipt of Order
24 Granting Motion to Withdraw.

25
26 14. On August 8, 2019, Cohen wrote me: "Thx for the prompt reply. Did Plaintiff send you
27 Plaintiff's FRCP 26 Initial Disclosures? If so, please send it. Was any discovery done in this
28 adversary? If so, please send them."

1 15. On August 8, 2019, I responded: "Per my previous email, there was no communication by your
2 client so no nothing further was done. They retained me on a limited scope and were not in
3 touch after with further instruction or guidance. I recommend calling Trustees counsel
4 regarding case status, I'm surprised they haven't filed anything else yet. Nick got lucky."

5
6 16. On August 9, 2019, Cohen wrote me informing me that Plaintiff's Unilateral Pretrial stated that
7 he indeed propounded discovery Request for Admissions ("RFA's") to the Defendant, that
8 Defendant did not respond to, and that they are now deemed admitted. Cohen asked me why
9 wasn't he given copies of this discovery?"

10 17. On August 9, 2019 I responded: "Ps I'll speak to my office regarding receipts of anything on
11 their end but please note we were retained specifically for an answer and joint status report and
12 conference. We had no further involvement or guidance. Lastly, I appreciate your
13 professionalism going forward."

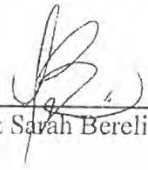
14
15 18. Soon thereafter communicating with Cohen, I reached out to the Plaintiff and was put in touch
16 with his legal assistant, Cristina Allen, whom I requested a copy of the alleged documents. Ms.
17 Allen forwarded to me a copy of an RFA and Roggs. I have not received any Initial
18 Disclosures from Ms. Allen or the Plaintiff at any point during the pendency of this adversary
19 proceeding and I do not believe any have been prepared or served.

20
21 19. On or about September 12, 2019, after unproductive email communication with Cohen, I
22 suggested and we had a conference call to discuss the subject of the Plaintiff's discovery. I
23 advised him that in reviewing my file as of August 7, 2019 (when Defendant reached out to me
24 for a copy of his file) I did not find a copy of any propounded discovery in my possession –
25 scanned or paper versions. It is my office's protocol to save a copy of paper documents
26 received and also to email a PDF version to clients and to save an electronic version.
27 Therefore, it is my understanding and belief that I am not in possession of any discovery
28 served upon my office for the Defendant prior to August 7, 2019. The only discovery in my

1 possession is the copy of the RFA and Roggs emailed to me by Ms. Allen on or about August
2 9, 2019.
3

4 I declare under penalty of perjury under the laws of the State of California and the United States of
5 America that the foregoing is true and correct.
6

7 Date: September 17, 2019
8



Sanaz Sarah Bereliani, Esq.
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DECLARATION OF NICHOLAS SILAO

I, NICHOLAS SILAO, declare as follows:

1. The facts stated below are true and correct within the best of my personal knowledge and if called upon to testify to them I could and would competently do so.
2. I am the defendant in this case.
3. On 11-8-2017, the Debtor Pandora Hospice Care, Inc., commenced this bankruptcy proceeding Case No. 6:17-bk-19336-SY.
4. On 10-2-2018, Plaintiff filed this adversary action entitled: *Karl T. Anderson against Nicholas Silao*, Adversary case 6:18-ap-01193 [Doc-1]
5. On 10-31-2018, my lawyer Sanaz S. Bereliani filed an Answer to the Complaint [Doc-4].
6. On 1-2-2019, the parties filed a Joint Status Report [Doc-5]. Of particular interest, in Section A4 of the Joint Status Report the parties acknowledged that they did not meet & confer pursuant to LBR 7026-1.³⁴
7. On 3-15-2019, Bereliani moved to withdraw as counsel of record [Doc-12], and on 4-16-2019, the Court entered its Order Granting Motion To Withdraw As Counsel Of Record [Doc-16].
8. On 8-7-2019 at 10:42am, I wrote Berliani (copying Cohen) and demanded my file from her pursuant to the California Rule of Professional Responsibility 4-100(B)4, that provides that an attorney must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.³⁵
9. On 8-8-2019, at 6:53am, Cohen wrote Berliani and copied me: "Thx for the prompt reply. Did Plaintiff send you Plaintiff's FRCP 26 Initial Disclosures? If so, please send it. Was any

³⁴A true and correct copy of the 1-2-2019 Joint Status Report [Doc-5] is attached hereto as Exhibit "I" and is incorporated herein by this reference.

³⁵A true and correct copy of Defendant's 8-7-2019 letter to Berliani (copying Cohen) demanding his file from her pursuant to the California Rule of Professional Responsibility 4-100(B)4 is attached hereto as Exhibit "2" and is incorporated herein by this reference.

1 discovery done in this adversary? If so, please send them."³⁶

2 10. On 8-8-2019 (late at night), I retained Cohen, who filed the *Substitution of Attorney* [Doc-25]
3 on 8-12-2019. Before being retained, Cohen specifically inquired of me Ms. Bereliani whether
4 we received any discovery from Plaintiff in this adversary, whether we received a proposed
5 Joint Pre-Trial from Plaintiff, & whether we received any FRCP 26 Initial Disclosures from
6 Plaintiff. I informed Cohen that I did not receive any of the aforementioned from Plaintiff. On
7 that basis, Cohen took the case.

8 11. When Cohen was prepared to file a declaration pursuant to LBR 7016-1(E)(2), when he
9 checked PACER and discovered Plaintiff's Unilateral Pre Trial and Declaration filings of 8-8-
10 2019, and we were surprised, to see that Plaintiff claimed that he indeed propounded discovery
11 to me - Request for Admissions ("RFA's") and that I did not respond, and Plaintiff is deeming
12 the following admissions, admitted:

- 13 a. RFA # 4. The Debtor loaned/transferred \$137,000 to Defendant, Nicholas Silao. The
14 Debtor's 2016 Federal Income Tax Returns signed under penalty of perjury reflected
15 the outstanding loan owed by Defendant, Nicholas Silao to the Corporate Debtor.
16 (Unresponded to Request for Admission No. 1).
- 17 b. RFA # 5. Pursuant to the Debtor's 2016 Federal Income Tax Returns, Defendant,
18 Nicholas Silao owes the Plaintiff/Chapter 7 Trustee no less than \$137,000, plus any
19 and all costs of collection. (Unresponded to Request for Admission No. 4).
- 20 c. RFA # 6. Plaintiff/Chapter 7 Trustee is entitled to pre-judgment interest as provided
21 under applicable non-bankruptcy law (Unresponded to Request for Admission No. 5).
- 22 d. RFA # 7. Defendant, Nicholas Silao has no defenses and/or counterclaims to
23 Plaintiff/Chapter 7 Trustee's demand for \$137,000. (Unresponded to Request for
24 Admission No. 6).
- 25 e. RFA # 8. Defendant, Nicholas Silao has no facts that dispute Plaintiff/Chapter 7
26

27 ³⁶A true and correct copy of Cohen's 8-8-2019 letter to Berliani is attached hereto as Exhibit
28 "4" and is incorporated herein by this reference.

- 1 Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint.
2 (Unresponded to Request for Admission No. 7).
- 3 f. RFA # 9. Defendant, Nicholas Silao has no documents, notes or other writings that
4 disputes the Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint.
5 (Unresponded to Request for Admission No. 8).
- 6 g. RFA # 10. Defendant, Nicholas Silao has no witnesses that dispute the Trustee's
7 entitlement to \$137,000 demanded in the Trustee's Complaint. (Unresponded to
8 Request for Admission No. 9).³⁷
- 9 12. I have evidence to dispute Plaintiff's turnover claim for \$137,000.00; I have witnesses and
10 exhibits re same., I produced these documents to Cohen who produced them to Plaintiff,
11 without the Plaintiff having to formally demand them from me to substantiate my claim that
12 I have exhibits to support my defense:
- 13 a. RFA # 4. The Debtor did not lend \$137,000 to Defendant. The facts will reveal just
14 the opposite: My client lent Pandora \$442, 00.00.
- 15 b. RFA # 5. Defendant does not owe the Plaintiff \$137,000 (plus any and all costs of
16 collection).
- 17 c. RFA # 6. Plaintiff is not entitled to pre-judgment interest as provided under applicable
18 non-bankruptcy law.
- 19 d. RFA # 7. Defendant, Nicholas Silao has defenses to Plaintiff's demand for \$137,000,
20 as raised in Defendant's *Answer* [Doc-4]. Again, the Debtor did not lend \$137,000 to
21 Defendant. The facts will reveal just the opposite: My client lent Pandora \$442, 00.00.
- 22 e. RFA # 8. Defendant has facts that dispute Plaintiff's entitlement to \$137,000
23 demanded in the Trustee's Complaint.
- 24 f. RFA # 9. Defendant has documents, notes or other writings that dispute the Plaintiff's
25 entitlement to \$137,000 demanded in the Trustee's Complaint.

26
27
28 ³⁷A true and correct copy of Plaintiff's 8-8-2019 Unilateral Pretrial & Declaration is attached
hereto as Exhibit "6" and is incorporated herein by this reference.

- 1 13. Regarding the exhibits, we presented to Plaintiff:
- 2 a. Pandora's loan report to the Silao brothers reflecting that during the period of 12-16-
- 3 2013 - 5-20-2015, Defendant lent Pandora approximately \$442,000.00 (and that his
- 4 brothers Michael Silao lent Pandora \$70,000.00, Sam Silao lent Pandora \$6,000.00,
- 5 & Ray Silao lent Pandora \$143,911.37, totaling \$662,411.37).
- 6 b. The last page of Pandora's **2014** tax return (**FYE 12-31-2014**) Form 1120, Page 5,
- 7 Schedule L, Line 19, entitled: "Loans from Shareholders" showing that my client was
- 8 owed \$389,750.00 by Pandora for that year ("Loan Payable N Silao");
- 9 c. The last page of Pandora's **2015** tax return (**FYE 12-31-2015**) Form 1120, Page 5,
- 10 Schedule L, Line 19, entitled: "Loans from Shareholders" showing that my client was
- 11 owed between \$389,750.00 - \$297,250.00 by Pandora for that year ("Loan Payable
- 12 N Silao");
- 13 d. Pandora's Balance Sheet as of **12-31-2015**, under the section entitled: "Liabilities &
- 14 Equity" reflecting "Loan/Financing Payable N. Silao \$297,250.00;
- 15 e. The last page of Pandora's **2016** tax return (**FYE 12-31-2016**) Form 1120, Page 5,
- 16 Schedule L, Line 19, entitled: "Loans from Shareholders" showing that my client was
- 17 owed between \$297,250.00 - \$295,250.00 by Pandora for that year ("Loan Payable N
- 18 Silao");
- 19 f. Pandora's (9) checks to my client that contain the notation: "Reimbursement - Loan:"
- 20 i. Pandora's 7-31-2015 check # 9001 to Defendant for \$25,000.00;
- 21 ii. Pandora's 9-4-2015 check # 9002 to Defendant for \$25,000.00 contains the
- 22 notation: "Loan Repayment;"
- 23 iii. Pandora's 9-15-2015 check # 1112 to Defendant for \$2,500.00 contains the
- 24 notation: "Reimbursement - Loan;"
- 25 iv. Pandora's 10-9-2015 check # 9003 to Defendant for \$25,000.00 contains the
- 26 notation: "Loan Repayment;"
- 27 v. Pandora's 10-15-2015 check # 1130 to Defendant for \$2,500.00 contains the
- 28

- 1 notation: "Reimbursement;"
- 2 vi. Pandora's 11-1-2015 check # 1131 to Defendant for \$2,500.00 contains the
- 3 notation: "Reimbursement;"
- 4 vii. Pandora's 11-2-2015 check # 0005 to Defendant for \$25,000.00 contains the
- 5 notation: "Loan Repayment;"
- 6 viii. Pandora's 12-1-2015 check # 1132 to Defendant for \$2,500.00 contains the
- 7 notation: "Reimbursement;"
- 8 ix. Pandora's 12-2-2015 check # 8655 to Defendant for \$25,000.00 contains the
- 9 notation: "Loan Repayment."

10 14. Regarding the witnesses, we disclosed to counsel: RFA # 10. I have witnesses that dispute the

11 Trustee's entitlement to \$137,000 demanded in the Trustee's Complaint: Defendant; the other

12 Silao brothers; Pandora's CPA Rufino Reyes Magpayo.

13

14 I declare under penalty of perjury under the laws of the United States and the State of New

15 York and of California that the foregoing is true and correct.

16 DATED: September 14, 2019

17 By /S/ Nicholas Silao

18 NICHOLAS SILAO

19  9/14/2019

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

4929 Wilshire Boulevard, Suite 940, Los Angeles, California 90010.

A true and correct copy of the foregoing document entitled: **DEFENDANT'S MOTION TO ALLOW WITHDRAWAL OF DEEMED ADMISSIONS F.R.C.P. 36(B); DECLARATIONS OF BARUCH C. COHEN, NICHOLAS SILAO & SANAZ S. BERELIANI** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On 1/22/2020, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Baruch C Cohen	bcc@BaruchCohenEsq.com, paralegal@baruchcohenesq.com
Karl T Anderson (TR)	2edansie@gmail.com, kanderson@ecf.axosfs.com
Thomas J Polis (PL)	tom@polis-law.com, paralegal@polis-law.com; r59042@notify.bestcase.com
US Trustee (RS)	ustpreion16.rs.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: On 1/22/2020, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on 1/22/2020, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Hon. Scott H. Yun, USBC, Central District of California, 3420 Twelfth Street, Suite 345, Riverside CA 92501

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

1/22/2020
Date

Baruch C. Cohen, Esq.
Printed Name

/s/ Baruch C. Cohen
Signature